

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLUMBIA

STATE OF NEW YORK,  
COMMONWEALTH OF  
MASSACHUSETTS, DISTRICT OF  
COLUMBIA, STATE OF  
CALIFORNIA, STATE OF  
DELAWARE, COMMONWEALTH  
OF KENTUCKY, STATE OF  
MARYLAND, STATE OF NEW  
JERSEY, STATE OF OREGON,  
COMMONWEALTH OF  
PENNSYLVANIA,  
COMMONWEALTH OF VIRGINIA,  
and STATE OF WASHINGTON,

Plaintiffs,

v.

U.S. DEPARTMENT OF LABOR, R.  
ALEXANDER ACOSTA, in his  
official capacity as Secretary of the  
U.S. Department of Labor, and  
UNITED STATES OF AMERICA,

Defendants.

Civ. Action No. 18-1747-JDB

**DECLARATION OF PATRICIA F O'CONNOR IN SUPPORT OF PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

I, Patricia F. O'Connor, declare:

1. I am an Assistant Attorney General and the Deputy Director of the Maryland Attorney General's Health Education and Advocacy Unit (HEAU). I have served in this position for over 4 years. Prior to joining the HEAU, I served as an Assistant Attorney General for the Maryland Department of Health.

2. The HEAU was established to promote the interests of health consumers in the health marketplace, among other purposes. The HEAU assists Maryland residents with health insurance enrollment, enrollment denials, denials of advance premium tax credits, denials of cost-sharing reductions, denials of coverage, and disputes involving medical billing, equipment and records. The HEAU advocates for consumers during federal and state legislative, administrative and rulemaking proceedings.
3. In my role as Deputy Director, I am responsible for written and oral testimony in legislative, administrative and rulemaking proceedings relating to Maryland's health care delivery system, including the regulation of private health insurance.
4. The Affordable Care Act ("ACA"), coupled with the Maryland Health Insurance Reform Act (the "Maryland Act"), has been very successful in improving quality and access to health care for small employers and individuals in Maryland.
5. The ACA, the Maryland Act and other insurance reforms have provided members of small groups and individual plans in Maryland with robust protections that other plans often fail to provide. Members benefit from standard benefit designs, including essential health benefits (e.g. maternity services, mental health and substance use disorder services, prescription drugs), community rating, and guaranteed coverage despite age, occupation, health conditions, or claims experience.
6. The State has made great strides in improving access to health care coverage, with the uninsured rate decreasing from 10.2 percent in 2013 to 6.1 percent in 2016. As of February 1, 2018, 145,109 residents were enrolled in qualified health plans offered through the Maryland Health Benefit Exchange, and over 315,000 were enrolled in the ACA Medicaid expansion. With these coverage expansions, hospital uncompensated care has decreased from

7.2 percent of gross patient revenue in state fiscal year 2013 to 4.6 percent in 2016. This in turn reduced the all-payer costs for uncompensated care built into hospital rates under Maryland's hospital rate-setting system. [https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section\\_1332\\_State\\_Innovation\\_Waivers-.html#Section%201332%20State%20Application%20Waiver%20Applications](https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-.html#Section%201332%20State%20Application%20Waiver%20Applications)

7. But, over the past several years, a number of carriers have exited the individual health insurance market, resulting in less competition in the market and leaving fewer choices for consumers. In addition, average rates have increased by as much as 53.6 percent between 2017 and 2018 alone. Without further stabilization efforts, premiums are expected to continue to increase at an unsustainable rate, raising concerns about the future viability of the individual market, a loss of access to coverage for consumers, and potential downstream implications for Maryland's hospital all-payer model.

[https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section\\_1332\\_State\\_Innovation\\_Waivers-.html#Section%201332%20State%20Application%20Waiver%20Applications](https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-.html#Section%201332%20State%20Application%20Waiver%20Applications)

8. In response, on May 31, 2018, Maryland filed a Section 1332 State Innovation Waiver Application to waive Section 1312(c)(1) of the ACA to implement a state reinsurance program, which, if approved, will allow Maryland to include expected state reinsurance payments when establishing the market wide index rate. This will decrease premiums in the individual market and federal payment of advance premium tax credits.

9. The Department of Labor's Final Rule re-interpreting ERISA's definition of employer will, in my opinion, undermine Maryland's efforts to stabilize the individual market and otherwise negatively impact Maryland's marketplace.

10. In particular, the HEAU expects to see (a) a decrease in enrollment in the individual and small group markets, leading to further premium increases in those markets, (b) an increase in the marketing and promotion of Association Health Plans (AHPs) that fail to comply with our state's laws based on our experience in the past, and (c) medical and financial risk to Maryland residents who enroll in AHPs due to the skimpy benefits that they will likely provide.

11. As a result of the Final Rule, the HEAU expects that individuals and entities will market and promote AHPs in Maryland that do not comply with state laws or that are fraudulent and/or underfunded. Maryland law provides that all small employers and individuals (regardless of their status as "working owners") who join an AHP must comply with state laws regulating the small group market, even if the AHP itself would be recognized as an "employer" under the Final Rule for purposes of ERISA and, thus, due to its total number of enrollees, be categorized as a large group. Md. Code Ann., Ins. § 15-1202(c)(2017 & Supp. 2018). In such situations, each small employer who enrolls in an AHP, regardless of the total size of the AHP, would be regulated at the individual "employer" level and would need to comply with Maryland laws regarding, among other things, standard benefits and rating rules. Further, self-insured multiple employer welfare arrangements (MEWAs) are required to obtain a certificate of authority as an insurer before operating in the State.

12. In prior instances, MEWAs have promoted their products in contravention of Maryland law. By way of example, in 2001, the Maryland Insurance Administration ("MIA") fined and revoked the license of an insurance producer who operated an illegal MEWA and engaged in "illegal and dishonest practices," such as failing to obtain a certificate of authority as required by state law; failing to pay premiums for stop-loss insurance contrary to representations made

to employer members (and thereby exposing these employers to unexpected losses); and failing to pay claims for insured employees. *Md. Ins. Admin. v. SAI Med Health Plan, LLC*, No. MIA-6-1/01 (Md. Ins. Admin. Jan. 16, 2001). In 2005, the MIA fined and revoked the license of an insurance producer who operated an illegal MEWA and made material misrepresentations regarding the relationship of the MEWA to the insured employees and, overall, engaged in conduct that was “dishonest and lacked ... trustworthiness and competence.” *Md. Ins. Admin. v. Dennis Kelly, et al.*, No. MIA-2005-07-004 (Md. Ins. Admin. Mar. 30, 2007).

13. As a result of the Final Rule, the HEAU expects that the MIA and the Attorney General’s Consumer Protection Division will need to devote additional resources to ensure that AHPs will comply with applicable state and federal laws and regulations as necessary to protect Marylanders.


14. As a further result of the Final Rule, the HEAU expects that small groups and “working owners,” who are generally healthier and have more attractive risk profiles, will be swayed by the marketing and promotion of less expensive AHPs that do not comply with state laws, and will leave Maryland’s individual and small group markets. The exit of these members from Maryland’s marketplaces will further destabilize those markets.

15. The HEAU also expects that enrollment in the individual market will be lower than it would have been if the Final Rule had not issued. The expansion of the footprint of AHPs, allowing individuals (“working owners”) to group together with others as an association in order to exit the individual market and seek lower premiums in the small group market, will further erode Maryland’s efforts to stabilize the individual market.

16. The Final Rule will also result in direct and indirect financial harm to the State of Maryland. The individuals and small groups who leave Maryland's marketplace to purchase AHPs that are not compliant with Maryland law will have inferior insurance compared to that which they would have obtained if they had remained in Maryland's market. As a result, members who experience pregnancy or suffer a sickness or injury that is not covered, are at risk for unexpected healthcare costs and may forego necessary care, face financial distress, or require additional expenditures through the Maryland Medicaid program or other state programs.

I declare under penalty of perjury that the foregoing facts are true and correct based on my knowledge, information and belief.

Executed on August 14, 2018, in Baltimore, Maryland.

  
Patricia F. O'Connor